ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION III

CACR05-1372

February 28, 2007

APPEAL FROM THE GREENE COUNTY CIRCUIT COURT
[CR2003-134]

JERRY EATON
APPELLANT

V.

HONORABLE DAVID N. LASER, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

A Greene County Circuit Court jury convicted appellant, Jerry Eaton, of the offenses of rape and incest. Eaton was sentenced to seventeen years in the Arkansas Department of Correction for the rape conviction and three years for the incest conviction, with the sentences to run consecutively. Prior to trial, appellant filed motions to suppress evidence and to suppress his statement, arguing that both were obtained illegally. A hearing was held on these motions, and they were denied. On appeal, Eaton argues that the trial court erred in (1) denying his motion to suppress his confession; (2) allowing the testimony of two 404(b) witnesses; and (3) refusing to grant directed verdicts on the rape and incest charges. We affirm.

Suppression Hearing

A hearing was held on May 9, 2005, on Eaton's motion to suppress his statement. Jeff Tiner, who was retired from the Paragould Police Department as lieutenant in charge of CID at the time of the hearing, testified that he had investigated the allegations against Eaton. He said the investigation began when Eaton's daughter, Tina Taylor, brought her daughter, A.T., to the police department, and A.T. said that once or twice a week for the past two years Eaton had been sticking his hands down her pants and had penetrated her with his finger.

Tiner determined that he needed to talk to Eaton, and he said that he thought Eaton came to the police station on his own. Tiner testified that Eaton was brought into his office and that he read Eaton his Miranda rights and completed the rights form when Eaton first arrived, even before he told Eaton the allegations against him. Tiner testified that Eaton indicated that he understood his rights and then signed the form. Tiner said that after Eaton signed the rights form, Eaton asked, "Do you think I need an attorney?" to which Tiner replied that he could not make that determination, that that was something Eaton had to decide for himself. Tiner did not recall Eaton asking to call an attorney. Tiner testified that when he told Eaton about the allegations made by A.T., Eaton said that he did not remember, and that when he would get specific with the allegations, Eaton would say things like "she doesn't lie" and "well, if you say I did, I did."

Tiner testified that the questioning lasted approximately forty-five minutes and that two other officers were present with him and Eaton during the questioning. Tiner said that

he was not wearing a firearm during the questioning, that no threats were made, and that there was no coercion to make Eaton give a statement. He said that Eaton never asked to terminate the questioning. He also said that there was not a tape-recorded statement because Eaton told him that he did not like tape recorders; Eaton's statement was written out for him by one of the officers after Eaton said that he could not read or write very well. Tiner stated that he was certain that Trooper Phil Carter read the statement back to Eaton, that Eaton made corrections in the statement, and that Eaton initialed the corrections.

Tiner testified that Eaton did not seem confused during the questioning, but that in some ways he did because everything Tiner would try to ask him, Eaton answered that he did not remember, "if you say I did it, I did it," or "if my granddaughter said I did it, I did it." Tiner said that he did not make any suggestions to Eaton during the questioning. He testified that Eaton understood that he could talk to a lawyer, but Tiner said that he never asked Eaton if he wanted to call a lawyer, and he did not think that Eaton was advised that he did not have to stay at the police department.

Arkansas State Trooper Phil Carter testified that the Paragould Police Department requested that he assist in Eaton's sexual-abuse investigation, and that he came to the police station for Eaton's interview. Carter said that the interview began after he arrived, that he witnessed Tiner discussing the rights form with Eaton and reading Eaton his rights, and that he heard Eaton's responses. Carter testified that based on his observations, he

believed that Eaton understood each of his rights, and that the questioning began only after Carter was satisfied that Eaton understood his rights and knowingly waived those rights.

Carter testified that when the officers would make a statement about what they had been told, Eaton would say "if she said this then I guess it's true, but, you know, I don't remember saying it" or "I don't remember doing it." Carter said that there were three officers in the room with Eaton at the time of the questioning; that no one had weapons or restraining devices; that there was no coercion or threats; and that Eaton kept saying that his memory was bad. Carter stated that when he asked Eaton if he was taking any medication for his memory, Eaton said, "no," that he took cholesterol and blood-pressure medication and occasionally a Xanax, but not very often.

Carter testified that Eaton was given the opportunity to give a statement on tape but that Eaton did not want to be taped. Carter stated he then told Eaton he could write out in his own words what had happened, but Eaton said that he did not write "very good" and did not seem to want to write out a statement. Carter said Eaton then agreed for Carter to write down what Eaton told him to write; Carter identified State's Exhibit 2 as the original handwritten statement that was completely in his handwriting. Carter said that he had made several corrections in the statement, and that Eaton had initialed each of the corrections. Carter noted that one of the corrections he made was to change "I didn't stick my finger" to "I didn't stick all of my finger in her." Carter said that he did not ask Eaton

to read the statement out loud to him and that Eaton corrected him as Carter was reading it. This exhibit was entered into evidence without objection.

Carter testified that he thought Eaton understood what was going on very well because after Eaton gave his statement he made comments about going to jail and about his Masonic Lodge brothers finding out about the incident in the paper, and stated that "this is gonna send me down the river." Carter said that he did not hear Tiner ask Eaton if he wanted a lawyer, he did not hear Tiner ask if he wanted to give up his rights to a lawyer, and he never heard him ask for a lawyer. Carter said that Eaton asked Tiner if he needed a lawyer, and Tiner told him that he could not answer that for him. Carter said that although Eaton told him that he took Xanax from time to time, Eaton did not seem confused at the interview, even though he kept saying that he had trouble remembering.

Charles Wilson of the Arkansas State Police testified that he went to Greene County with Carter for a rape investigation, and although he did not remember Eaton's face, he remembered his name. He said that he, Tiner, Carter, and Eaton were in Tiner's office, and that no one else came in during Eaton's questioning. Wilson said that he just observed, and he did not see anything that seemed to be coercive or threatening against Eaton. He said that he observed Tiner read Eaton his rights; that he heard Eaton's responses, which appeared to be coherent to him; and that Eaton said that he understood his rights. Wilson did not hear Eaton say anything about a lawyer, and he did not recall Eaton asking if he needed a lawyer. He said Eaton said that he did not write well and

Eaton asked Carter to write his statement for him; that Carter had Eaton look over the statement and make corrections after it was written; and that Eaton initialed the corrections. Wilson said that Eaton seemed to be coherent to him, although he admitted that he did not know what normal was for Eaton.

Eaton testified at the suppression hearing that on the day he went to the police department, he had been to the hospital that morning to have some tests run and he had become dizzy and light-headed and had to pull over on the side of the road on his way home. Eaton said that when he got home, he took all of his medication and went to sleep. He stated that the next thing he remembered was a knock at the door, getting out of bed, and seeing two police officers at the door who told him that he was needed at the police station. Eaton said that he asked if they were going to take him or if they wanted him to take his car; he said that the officers did not say anything about an interview.

Eaton testified that he did not remember how he got from his house to the police station; that he did not remember getting into his truck; and that he did not remember walking up to the door at the police station. He said that he did remember going into Tiner's office, Tiner saying "Do you want a lawyer?," and Eaton asking, "Do I need a lawyer?" He said that he remembered being behind Tiner's desk; that there was a recorder; that Tiner had him repeat everything he was saying, like "by the couch"and "put your hand down her pants"; and that he did not know what went on after that. He testified he remembered being in a little room with a paper in front of him with Tiner saying, "sign

here." Eaton said he signed his name but did not know what he signed. Eaton denied that he was read his rights or that he signed a waiver-of-rights form, although he admitted that it was his signature on the form, but he could not explain how it got there. He said that he did not understand what was going on that day, that he did not remember much until a couple of days after he was in jail, and that he did not know why he was in jail. Eaton blamed his daily medication, and he said that all of the people in jail said that he was repeating everything that they were saying.

At the close of the suppression hearing, the trial court found that the State had proven by clear and positive proof that Eaton had been advised of his rights prior to questioning, including his right to counsel and the right to stop answering questions at any time. The trial court also found that Eaton's question to the officers as to whether he needed a lawyer and being told that that was his decision indicated further advice of his right to retain a lawyer at any time. From the above, the trial court found that the voluntariness and admissibility of the statement had been duly proven by the State, and it denied the motion to suppress.

Jury Trial

A jury trial was held on August 9 and 10, 2005. The testimony of the officers who testified at the suppression hearing was largely the same during the trial as it was at the suppression hearing. However, during Phil Carter's testimony at trial, he read the statement given by Eaton into the record:

> What [A.T.] is saying is the truth. She is not lying about it. I did touch her private parts. I rubbed on her privates but did not stick all of my finger in her. I only stuck it is a little bit. It was not very far. [A.T.] asked me to touch her to make her feel good. She would say, Papa, would you play with me. I did it because I felt like it was my obligation to her, because I love her. I would tell her if she would let me play with her I would buy her a soda and let her play on the computer. I always thought I was helping her and did not feel bad about doing it.
>
> The last time I rubbed her was about two weeks ago. I did it in front of the couch in the living room. I have done it there before. She did not tell me to stop. [A.T.] is not very big. She does not have any breast, but she does have a little hair on her privates. I have also done this in the bath-bedroom. I have always done this in the bedroom. I never, I never did it at her house because her mom and dad were there. I have been doing this for about two years. I don't think she had any sexual feelings because she was not twelve or thirteen.

The victim, A.T., testified that she was thirteen years old and would be entering the eighth grade. She identified Eaton as her grandfather, and she said that when she was between eight and ten, Eaton did inappropriate things to her. She stated that Eaton was her babysitter most of the time, that she would usually go to his house almost every day, and that her grandmother was not home much because she worked all the time. A.T. said that Eaton would touch her privates and stick his finger in her "a little bit," which she said hurt sometimes. She said Eaton would "rub hard" when he put his fingers down her pants, and that it would hurt when he "hardly put his fingers inside" her. She testified that he would make her put his penis in her mouth, and that sometimes "stuff" would come out of it. A.T. said that Eaton told her not to tell because social workers would come and take him away and she would not get to see him anymore. She said that this happened several times

a week, and that when it was over, Eaton would usually take her somewhere and buy her something.

On cross-examination, A.T. admitted that she did not tell Tiner about Eaton putting his penis in her mouth because she was scared, and that she had not told anyone about that until the week before the trial. Eaton's counsel noted to her that she had told Tiner that she had not ever seen her grandfather's privates. A.T. responded that she did tell Tiner about Eaton putting his finger in her. Tiner's statement indicated that she told him that Eaton had not put his finger inside of her. A.T. also said that she did not remember if she told her counselor anything about Eaton putting his finger inside of her or him putting his penis in her mouth.

Jessica Crump, A.T.'s twenty-year-old cousin, testified that when she was eight, Eaton took her to McDonald's, and while they were in the drive-thru, he asked her to sit on his lap. When she told him no, she said that Eaton began touching her private parts through her pants. Crump said that it was very uncomfortable and that she told him to stop and to take her home. She said that Eaton had never tried anything before that day, and that she was never alone with him after that day.

M.H. testified that she was thirteen, was entering the eighth grade, and that Eaton was her friend A.T.'s grandfather. M.H. said that she knew Eaton from the time she was eight until she was ten, and that she would go to Eaton's house with A.T. M.H. said that Eaton made her put her mouth on his penis and that "a bunch of white stuff" came out of it

into her mouth. She said that he would put his finger in her and touch her in places he was not supposed to touch, and that he would also put his mouth on her private parts. M.H. said that Eaton did not stick his fingers in her vagina because she would push him away when he tried that. She said that he would get her to do these things by telling her that she would never see her dad again, and he would stop when she said that she had to use the bathroom. She indicated that Eaton would take her places and buy her things.

On cross-examination, M.H. said that she did not tell anyone when this first began happening because she did not think that there was anything wrong with what Eaton was doing. She said that later she thought it was wrong, but she did not tell her parents that Eaton was hurting her. M.H. admitted that when she talked to Tiner, she told him that Eaton had not stuck his finger in her, and that she had not told him about any of the accusations she was now making because she "couldn't get them out."

The State rested after M.H.'s testimony. The defense made directed-verdict motions on both counts, which the trial court denied.

Eaton testified on his own behalf. He said that he was fifty-six years old, had a ninth-grade education, and was a master plumber. He said that he did not have his glasses on the day he went to the police department; that earlier that day, he had some tests run at a Jonesboro hospital; and that he had taken his medication that day as well, including three Xanax. He testified that he would forget to take his medicine during the day on account of his memory, so he had started taking all of his medicine before he went to bed. He said

that after he got home from the hospital he was light-headed, so he went to bed; that he had been asleep for about thirty minutes when a knock on the door woke him up; and that when he answered it, there were two police officers on the porch. He said one of the officers told him that he was needed at the police station, and he asked if they were going to take him or did they want him to drive. Eaton stated that he remembered shutting his door and turning into the police station, but he did not remember getting into his truck or parking at the station. He said that he then remembered sitting in a chair and Tiner asking him if he wanted a lawyer, he in reply asking Tiner if he needed a lawyer, and Tiner asking him again if he wanted a lawyer. Eaton said that Tiner had him repeat things like, "Put your hand down her pants," and that he kept repeating everything Tiner said. Eaton testified that he did not remember signing the rights form – he said that it looked like his signature, but he denied signing it. Eaton said that he remembered Tiner telling him to sign a paper with little squares and marks on it, but he did not know what that paper said.

Eaton testified that there was no way that Jessica Crump was telling the truth; that nothing M.H. said was true; and that A.T. was not telling the truth either. Eaton said that he had not had sex for some time because of the medication he was taking, and that it had been a long time since he could "really do anything."

On cross-examination, Eaton said that he could read a little bit but could not spell, and that he could not have gone over his statement with the police because he could not see it. Eaton said that the officers let him drive to the police station when they came to tell

him that he was needed at the station, but he said that he did not know if he was going there to do some plumbing or not. He testified that he was sure that he was under the influence of prescription drugs at the time he went to the police department, and that it should have been obvious that he was under such an influence, although he did not remember telling the officers about Xanax or any other medication.

Eaton testified that he "did not hear nothing about no rights," and that although it looked like his signature on the rights form, he had no recollection of signing it. He said he did not remember anything except Tiner asking if he wanted a lawyer and him asking Tiner if he needed a lawyer. Eaton said that he thought the officers knew there was something wrong with him and took advantage of him. Eaton accused the officers of trying to record his voice so that they could "doctor" a tape and incriminate him, but that they "could not get it right" and that was the reason there was no tape.

Ann Eaton testified in her husband's defense. She said that A.T. and Eaton seemed to get along fine, that she had never noticed a hesitancy on A.T.'s part to be left alone with Eaton, and that A.T. had never mentioned to her that anything inappropriate was occurring. Ann stated that Eaton's memory was "pretty bad" in March 2003, and that he was taking Flomax, Lipitor, Prilosec, and Xanax every day at that time. She said that he was supposed to take Xanax three times per day, but that he would get busy and just take a handful of pills at night. Ann testified that Eaton acted "weird" when he took Xanax, that he would not know what he was doing or saying when he was under its influence, and that

he could not comprehend what others were saying to him. Ann stated that she did not have any reason to believe the allegations A.T. had made against Eaton were true. She said that she and Eaton did not have a sex life because of all the medication he was taking. On cross-examination, she admitted that she was gone from home forty to fifty hours per week and really did not know what Eaton was doing during the day.

The defense rested after Ann Eaton's testimony, and the State called Officer Michael Perkins of the Paragould Police Department as a rebuttal witness. Officer Perkins testified that he was one of the officers who went to Eaton's house on March 26, 2003, and told Eaton that he was needed at the police department. Perkins said that he talked to Eaton face-to-face, and that Eaton responded to him. Perkins recalled that Eaton drove his own vehicle to the police station. Perkins said that he was familiar with how people act under the influence of prescription drugs, and that he did not notice any of those characteristics in Eaton on that day. Perkins said that had he noticed any of those characteristics, he would not have let Eaton drive his own vehicle, and he would have told one of the investigators if he had thought Eaton was under the influence.

After Perkins's testimony, Eaton renewed his motions for directed verdict. Those motions were again denied, the jury convicted Eaton of the offenses of rape and incest, and this appeal followed.

Motions for Directed Verdict

Although it is his third point on appeal, we must first address Eaton's sufficiency-of-the evidence argument that the trial court erred in denying his motions for directed verdict in order to preserve his right to freedom from double jeopardy. *See Malone v. State*, 364 Ark. 256, ___ S.W.3d ___ (2005). Motions for directed verdict are treated as challenges to the sufficiency of the evidence. *Chrobak v. State*, 75 Ark. App. 281, 58 S.W.3d 387 (2001). When an appellant raises a sufficiency-of-the-evidence argument, the appellate courts review the evidence in the light most favorable to the verdict, considering only the evidence that supports the verdict, to determine whether the verdict is supported by substantial evidence, direct or circumstantial; substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id*. The review of the sufficiency of the evidence includes an evaluation of otherwise inadmissible evidence. *Chrobak, supra*.

A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person who is less than fourteen years old. Ark. Code Ann. § 5-14-103(a)(3)(A) (Supp. 2003). "Deviate sexual activity" is defined as any act of sexual gratification involving the penetration, however, slight, of the anus or mouth of a person by the penis of another person or the penetration, however slight, of the labia majora or anus of a person by any body member or foreign instrument manipulated by another person. Ark. Code Ann. § 5-14-101(1) (Supp. 2003). A person commits incest if the person, being over twenty-one, has sexual intercourse with or engages in deviate sexual

activity with a person under sixteen whom he knows to be a descendant. Ark. Code Ann. § 5-26-202(a)(1) (Supp. 2003).[1]

Eaton argues on appeal that A.T. gave conflicting statements, which taken as a whole were insufficient to prove the existence of a crime. He points out that while A.T. testified at trial that Eaton had put his penis in her mouth, she had never disclosed that fact to anyone until the week before trial, and that although A.T. had told Tiner that she had never seen Eaton's genitalia, she testified differently at trial. Eaton also argues that the jury could have relied upon the highly prejudicial testimony from Jessica Crump and M.H. that should not have been allowed.

We find no merit in these arguments. In determining whether there was sufficient evidence, this court looks at all of the evidence, even evidence that was erroneously admitted, to determine if there was sufficient evidence to support the verdicts. In this case, not only was there a confession from Eaton that he put part of his finger in A.T., his granddaughter, thirteen-year old A.T. also testified that Eaton had put his penis in her mouth and ejaculated and had put his finger inside of her private parts from the time she was eight until she was ten. While Eaton points to inconsistencies in A.T.'s testimony, the determination of the credibility of witnesses is the responsibility of the jury, not this court. Furthermore, there was testimony from two other girls who said that when they were

[1]This statutory provision was amended in 2003. However, the information charging appellant alleged that the conduct occurred between 2001 and March 2003; therefore, the prior version of the statute is applicable in this case.

A.T.'s same age, Eaton did the same thing to them that he had done to A.T. We hold that there is sufficient evidence to support Eaton's rape and incest convictions.

Motion to Suppress Statement

Eaton also argues that the trial court erred in denying his motion to suppress his statement given at the Paragould Police Department. In *Davis v. State*, 351 Ark. 406, 413, 94 S.W.3d 892, 896 (2003), our supreme court clarified the appellate court's standard of review for a suppression challenge: "Our standard is that we conduct a *de novo* review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court."

Statements made while in custody are presumptively involuntary, and it is the State's burden to prove by a preponderance of the evidence that a statement made while in custody was given voluntarily and was knowingly and intelligently made. *Harper v. State*, 359 Ark. 142, 194 S.W.3d 730 (2004). In *Harper*, our supreme court held:

> In order to determine whether a waiver of Miranda rights is voluntary, this court looks to see if the confession was the product of free and deliberate choice rather than intimidation, coercion, or deception. This court has consistently held that relevant factors in determining whether a confession was involuntary are age, education, and the intelligence of the accused, as well as the lack of advice as to his constitutional rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of mental or physical punishment. Other relevant factors in considering the totality of the circumstances include the statements made by the interrogating officer and the vulnerability of the defendant.

359 Ark. at 153, 194 S.W.3d at 736 (citations omitted).

In the present case, Tiner testified that he read Eaton his rights and asked him if he understood those rights; Eaton responded that he understood his rights and then signed the Miranda form. Both Carter and Wilson testified that they believed Eaton understood his rights, and none of the officers asked Eaton any questions until they were satisfied that he did indeed understand his rights. No officer testified that he believed Eaton was impaired. The interview lasted only forty-five minutes, and the officers testified that there was no coercion or force applied to procure Eaton's statement. Furthermore, there was testimony indicating that Eaton understood what was going on because he made comments like "this is gonna send me down the river," and was concerned about his Masonic Lodge brothers reading about the incident in the paper.

On appeal Eaton claims that he was so heavily medicated that he could not make an intelligent waiver of his rights. When an appellant argues that his confession was involuntary due to drug or alcohol consumption, the level of his comprehension is a factual matter to be resolved by the circuit court. *Harper, supra*. In testing the voluntariness of a person claiming to be drug-impaired at the time he waived his rights and made a statement, the reviewing court determines whether the person was of sufficient mental capacity to know what he was saying --- capable of realizing the meaning of his statement --- and that he was not suffering from any hallucinations or delusions. *Harper, supra.*

It is clear from the trial court's denial of Eaton's motion to suppress that it did not believe that Eaton was so impaired by his medications that he was unable to knowingly

and voluntarily waive his rights and give a statement to the police. While Eaton testified that he was under the influence of a lot of medication, that he did not remember how he got to the police station, and that he did not remember signing the Miranda form, there was also testimony from the officers involved in obtaining the statement that Eaton understood his rights and proceeded to give a statement. Giving due deference to the inferences drawn by the trial court, based upon the totality of the circumstances, we cannot say that the trial court's denial of appellant's motion to suppress was clearly erroneous, and we affirm the denial of the motion to suppress.

404(b) Challenges

Eaton's final argument is that the trial court erred under Arkansas Rule of Evidence 404(b) in allowing Jessica Crump and M.H. to testify that Eaton had molested them at around the same age he began molesting A.T. A trial court has wide discretion in admitting or rejecting evidence, and its decision will not be reversed absent a manifest abuse of discretion. *Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Our appellate courts have recognized a "pedophile exception" to Rule 404(b), and under this exception, "evidence of other sexual acts with children is admissible when it tends to show a proclivity toward a specific act with a person or class of persons with whom the

accused has had an intimate relationship." *Thompson v. State*, 322 Ark. 586, 589, 910 S.W.2d 694, 697 (1995). The exception exists to allow evidence tending "to show that the perpetrator has 'a proclivity' for the sexual abuse of children." *Hernandez*, 331 Ark. at 310, 962 S.W.2d at 761.

Jessica Crump, A.T.'s twenty-year old cousin, testified that when she was eight, Eaton touched her inappropriately and asked her to sit on his lap, which she refused to do. At the time of that incident, Jessica was at the same age as A.T. when Eaton began molesting her. M.H., one of A.T.'s friends who is the same age as A.T., testified that between the ages of eight and ten, she visited Eaton frequently at his house, and that Eaton touched her inappropriately and put his penis in her mouth. Eaton argues on appeal that the girls' testimony was not independently relevant to the issue of whether Eaton committed rape and incest with A.T. We disagree. Although Jessica's testimony involved an incident that occurred twelve years ago, both girls' testimony was relevant in establishing Eaton's proclivity in molesting female children between the ages of eight and ten with whom he had established a relationship. We cannot say that the trial court manifestly abused its discretion when it allowed both Jessica and M.H. to testify.

Affirmed.

ROBBINS and MILLER, JJ., agree.